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THE NORTH CAROLINA HEARSAY RULE AND THE UNIFORM RULES OF EVIDENCE*

LEONARD S. POWERS†

I

INTRODUCTION

There has long been agitation for reform of the common law rules of evidence. The demand for simplification and modernization led to an attempt at general revision in 1942 when the American Law Institute adopted its *Model Code of Evidence*. Unlike the Institute's *Restatements*, the objective of the *Model Code* was not to restate the law as it existed. The reason for not attempting a restatement of the law of evidence was the belief that the rules generally in use were defective in that they tended to suppress the truth. It was concluded that "a restatement of the law of evidence would be a waste of time or worse; that what was needed was a thorough revision of existing law."¹

The *Model Code* consisted of 116 rules. Though generally approved by students of the subject, the courts and legislatures paid it little heed. No jurisdiction adopted the proposal. Its departures from the common law were thought to be too drastic. This was particularly true of its provisions on hearsay. Also, it was charged that it was too academic in its form of expression and, perhaps the other side of the same coin, that it was lacking in realism. In any event, the question is now moot. The *Model Code* has been superseded by the *Uniform Rules of Evidence*,² and another debate concerning the need for reform in the rules of evidence and the worth of the new proposals has begun.

The National Conference of Commissioners on Uniform State Laws determined in 1948 that the law of evidence was a proper field for uniform legislation. In 1949, the American Law Institute referred its *Model Code of Evidence* to the Conference for study and for redrafting, if deemed advisable. At its meeting in 1949, the Conference decided to prepare a new evidence code, with appropriate credit to be given to

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¹ MODEL CODE OF EVIDENCE viii (1942).

² HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 161-215 (1953) (hereinafter cited as UNIFORM RULES OF EVIDENCE). Copies of the UNIFORM RULES with comments may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East 60th St., Chicago 37, Ill.

The American Law Institute's *Model Code*. In 1950, the designation of the proposed draft of rules was changed to "Uniform Rules of Evidence."³ The committee which prepared the draft was composed of a trial judge, who served as chairman, four practicing lawyers, and three law teachers.⁴ A committee appointed by the Institute, with Professor E. M. Morgan as chairman, advised the committee appointed by the Conference. The *Uniform Rules of Evidence*, consisting of 72 rules, were approved at the annual meeting of the Conference in 1953.⁵ The *Rules* were approved by the American Bar Association at its 1953 meeting,⁶ and approval by the American Law Institute came in 1954.⁷ They are now the center of discussion.⁸

The objectives sought by the draftsmen of the *Uniform Rules* were acceptability and uniformity.⁹ As stated by the chairman of the Committee, there was an idea that the *Model Code* might be given a "lawyer slant."¹⁰ The goal of uniformity would be expected to lead to mod-

³ *Id.* at 161.

⁴ The Committee which acted for the National Conference of Commissioners on Uniform State Laws was as follows: Judge Spencer A. Gard, Iola, Kansas (Chairman); Mason Ladd, University of Iowa Law School, Iowa City, Iowa; Charles T. McCormick, University of Texas Law School, Austin, Texas; Lucian E. Morehead, Plainview, Texas; Maynard E. Persig, University of Minnesota Law School, Minneapolis, Minn.; John Carlisle Pryor, Burlington, Iowa; Robert E. Woodside, Harrisburg, Pa.; Joe E. Estes, Dallas, Texas.

⁵ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 102-103 (1953).

⁶ 78 A. B. A. REP. 134 (1953).

⁷ McCormick, *Some High Lights of the Uniform Rules of Evidence*, 33 TEXAS L. REV. 559, 560 (1955).

⁸ Chadbourne, *The "Uniform Rules" and the California Law of Evidence*, 2 U. C. L. A. L. REV. 1 (1954); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. REV. 43 (1954); Falknor, *Evidence*, 1953 ANN. SURVEY AM. L. 787; Gard, *Kansas Law and the New Uniform Rules of Evidence*, 2 KAN. L. REV. 333 (1954); Gard and Barnhart, *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1954); Holbrook, *Witnesses*, 2 U. C. L. A. L. REV. 32 (1954); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1 (1954); McBaine, *Burden of Proof; Presumptions*, 2 U. C. L. A. L. REV. 13 (1954); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955); *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 N. U. L. REV. 481 (1954); *Illinois Presumptions and the Uniform Rules of Evidence*, 49 N. U. L. REV. 657 (1954); Note, 9 RUTGERS L. REV. 555 (1955).

⁹ UNIFORM RULES OF EVIDENCE, Prefatory Note.

"The Conference has recognized its obligation to use The American Law Institute's Model Code of Evidence as a basis from which to work, and has proceeded accordingly. . . . But if its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance, they should be modified in such respects as will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve. So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest."

¹⁰ Gard, *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1954). Judge Gard stated the objectives of his Committee more fully in an address before the Evidence Roundtable of The Association of American Law Schools at Chicago, Illinois, on December 28, 1953: "The broad aims of the Uniform Rules of Evi-

ernization and complete reform; the goal of acceptability would be expected to lead to concessions towards expediency and the "lawyer slant." The result is a compromise which is certainly entitled to great respect. The purpose here is to examine an especially sensitive area of evidence law as it is affected by the *Uniform Rules* in the hope that this will be the beginning of an examination of all the *Rules* and the changes they would make in the North Carolina law of evidence if adopted here. Certainly, careful study and, perhaps, changes in some of the *Rules* to fit local needs should precede any movement for enactment by the legislature.

The arrangement of the *Uniform Rules* is very much the same as that of the *Model Code of Evidence*. Rules relating to the saving of exceptions, comment on the evidence by the judge, and control of the judge over trial procedure, however, are omitted from the *Uniform Rules* as such procedural rules were "thought to be unnecessary or not within the scope of the general scheme to deal primarily with problems of admissibility of evidence."¹¹ The central principle around which the *Uniform Rules* revolve is Rule 7.¹² It is entitled "General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules." It abolishes all disqualifying and exclusionary limitations on the admissibility of relevant evidence. Most of the other rules, then, are limitations on and modifications of Rule 7. They bring back in the exclusionary principles and limitations desired. This was, of course, the pattern of the *Model Code*, which in turn was based on the concept of Professor Thayer and others that all things relevant or logically probative are prima facie admissible unless limitations are imposed by another rule.¹³ The draftsmen reduced the word volume by omitting the reaffirmations of admissibility and simply stating the limitations.

dence are the same as those of the *Model Code of Evidence*, namely (a) to rationalize the law of evidence, and (b) to express it in convenient, usable form. To these broad aims there may be added in the case of the *Uniform Rules*, the aim of uniformity as a desirable objective, which may, or should give some impetus to acceptance. Also there are the narrower and more immediate aims which are (a) to capitalize on the prestige of the *Model Code of Evidence* as a masterpiece of craftsmanship and coverage, (b) to give it more of the slant of the practicing lawyer and the judge on the bench and less of academic emphasis, (c) to avoid or materially reduce burdensome cross references, (d) to achieve further simplicity of expression, and (e) most important of all, to overcome the rather strenuous opposition in many quarters to the *Model Code's* liberality, by the simple expediency of being less liberal." 1953 ANN. SURVEY AM. L. 788.

¹¹ UNIFORM RULES OF EVIDENCE, Prefatory Note.

¹² "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

¹³ UNIFORM RULES OF EVIDENCE rule 7, Comment.

"There is considerable gain not only in shortening but in clarity and simplification of statement."¹⁴

The *Uniform Rules* do not deal with constitutional principles. It is recognized that a rule may be rendered inoperative by the requirements of due process or some other constitutional provision.¹⁵

One of the major advantages from enacting the *Uniform Rules* would be that with this integrated and exhaustive code, a jurisdiction would not have to wait on the slowly developing case law to fill in the gaps in its law of evidence. At the present time, the law of evidence in North Carolina, as elsewhere, is largely dependent on decisional law. This leaves many unsettled problems while the profession waits for a case dealing with such matters. The *Uniform Rules* offer "a painless and efficacious method" of filling the interstitial gaps in the law of evidence.¹⁶

Enactment of the *Uniform Rules* would mean some significant departures from the existing law of evidence in most jurisdictions. It is necessary, therefore, to warn that not all the significant changes would be in connection with the hearsay rule which is the subject of this study.

II

THE HEARSAY RULE

The rule excluding extrajudicial statements is no doubt the most familiar rule of evidence. Relatively speaking, however, it is not an ancient rule of the common law. The testimony of witnesses in open court as the usual source of proof did not itself develop until the early sixteenth century. It was near the end of the seventeenth century that the distrust of hearsay resulted in the formulation of a definite rule excluding it.¹⁷ This was preceded by a period of criticism directed at the admission of evidence of oral declarations made out of court though they were generally admitted. At the same time, the use in criminal prosecutions of sworn statements of persons not produced in court was coming under fire. So the rule developed out of dissatisfaction resulting from the admission of oral and written hearsay, the latter having a connection with the confrontation rule in criminal cases.

It is well to note, then, that hearsay has not always been excluded, and, indeed, the rule excluding it is a relatively modern development in the law. Perhaps this fact will temper the anguish of those who regard it as being in the same class with the Ten Commandments and,

¹⁴ *Id.*, Prefatory Note

¹⁵ *Ibid.*

¹⁶ Barnhardt, *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 at 48, 51 (1954). See Paschal, *Minimum Standards of Judicial Administration in North Carolina*, 29 N. C. L. REV. 27, 32-4 (1950), for a discussion of some needed reforms in the North Carolina law of evidence.

¹⁷ 5 WIGMORE, EVIDENCE § 1364 (3d ed. 1940) (hereinafter cited as WIGMORE, EVIDENCE).

therefore, immune from criticism and change. It "is not a matter of 'immemorial usage' nor an inheritance from Magna Charta but, in the long view of English legal history, is a late child of the common law."¹⁸

There are several reasons advanced to support this rule. One is the criticism that the person who uttered or wrote the hearsay statement did so without an oath being administered as would be done in court.¹⁹ This reason rests on an appreciation of the worth of the oath in supplying a religious motive for veracity, along with fear of punishment for perjury for the witness who lightly regards his religious obligation to be more truthful when under oath.

Another reason sometimes given for the rule is the right of the adverse party to confront the declarant.²⁰ Another is the danger that the witness reporting the statement may do so inaccurately.²¹ This is based on the feeling that there is a special danger of inaccuracy in the reporting of words spoken as contrasted with reporting other things. Other reasons are built around notions of intrinsic weakness and the danger of fraud.²² None of these reasons get to the heart of the matter, the main justification for the exclusion of hearsay.

¹⁸ MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 223 (1954) (hereinafter cited as MCCORMICK, EVIDENCE).

¹⁹ State v. Springs, 184 N. C. 768, 114 S. E. 851 (1922); STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 139 n. 7 (1946) (hereinafter cited as STANSBURY, N. C. EVIDENCE). The older North Carolina cases are collected in this excellent treatise, and it is frequently cited herein in lieu of a new list of such cases.). Dean Wigmore called attention to the fact that a hearsay statement is inadmissible even if made under oath, concluding that this demonstrates that lack of oath is not a reason for the rule. 5 WIGMORE, EVIDENCE § 1362. Professor Stansbury recognized this, citing *In re Chisman*, 175 N. C. 420, 95 S. E. 769 (1918) and *In re Hargrove*, 205 N. C. 72, 169 S. E. 812 (1933). Dean McCormick has observed, however, that "the fact that the oath is not the only requirement . . . to satisfy the rule against hearsay surely does not prove that it is not an essential or important one." MCCORMICK, EVIDENCE § 224.

²⁰ State v. Kluttz, 206 N. C. 726, 175 S. E. 81 (1934); *Satterwhite v. Hicks*, 44 N. C. 105, 57 Am. Dec. 577 (1852). To the extent that this reason rests on the constitutional right of accused persons to confront their accusers found in N. C. CONST. art. 1, § 11, it would seem to be inapplicable to civil cases. Wigmore contends that the constitutional right of confrontation in criminal cases is simply the rule against hearsay which can be satisfied if the extrajudicial statement falls within one of the recognized exceptions to the rule. Thus, the only effect of the constitutional provision is to put it beyond change by the legislature in criminal cases. 5 WIGMORE, EVIDENCE §§ 1397, 1398.

²¹ MCCORMICK, EVIDENCE § 224; 5 WIGMORE, EVIDENCE § 1363. Wigmore classifies this as a spurious theory of the hearsay rule, largely because it cannot be urged against written statements which are, nevertheless, subject to the rule. Also, oral words uttered out of court are admissible for non-hearsay purposes such as proving an operative fact like the utterance of slander. Logically, if this were a true reason for the rule it would exclude such extrajudicial utterances. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L. J. 229 (1922).

²² In *Mima Queen v. Hepburn*, 11 U. S. (7 Cranch) 290 (1813) Marshall, C. J., wrote the following: "That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible." Quoted in *State v. Kluttz*, 206 N. C. 726, 175 S. E. 81 (1934). These reasons have been

There is general agreement today that the real reason for the rule against hearsay is the lack of any opportunity to cross-examine the declarant who uttered the statement out of court.²³ This is the only reason which applies generally to all the applications of the rule and which encompasses some of the reasons already mentioned. It offers the best explanation for the exceptions to the rule. As to whether this makes the hearsay rule a product of the jury system as Thayer and Wigmore contended, or a result of the adversary system according to the Morgan view is a controversy which need not detain us. Certainly a trial conducted by adversaries before a jury sufficiently explains the origin of the right of cross-examination. It is a short step from that to a rule excluding testimony not subject to cross-examination because uttered out of court.

Thus, it appears that the hearsay rule has developed historically from reasons which were and still are a sufficient justification for some such principle of exclusion. Why, then, is there so much criticism of it and why have two major attempts been made at reform through codification within the last few years?

While Wigmore considered cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth,"²⁴ he also felt that the inflexibility of the hearsay exceptions, the overly technical construction of them by the courts, and a too rigid enforcement of the hearsay rule when such was not necessary resulted in needless obstruction to the investigation of truth.²⁵ Morgan has written that "the law governing hearsay today is a conglomeration of inconsistencies." He feels that there are too many irrational refinements and qualifications, and that the rule "has long cried aloud for drastic revision."²⁶ McCormick has pointed out that the hearsay rule in demand-

criticized. MCCORMICK, EVIDENCE § 224; 5 WIGMORE, EVIDENCE § 1363. The fact that much hearsay evidence is admitted under the numerous exceptions and that hearsay admitted without objection may be considered in determining whether there is enough evidence to sustain a verdict or finding of fact is an argument against such reasons. *State v. Bryant*, 235 N. C. 420, 70 S. E. 2d 186 (1952); *State v. Fuqua*, 234 N. C. 168, 66 S. E. 2d 667 (1951); *Maley v. Furniture Co.*, 214 N. C. 589, 200 S. E. 438 (1939). The North Carolina Court has excluded extrajudicial utterances because they are "self-serving." *Memory v. Wells*, 242 N. C. 277, 87 S. E. 2d 497 (1955); *Williams v. Young*, 227 N. C. 472, 42 S. E. 2d 592 (1947); STANSBURY, N. C. EVIDENCE §140 n. 16. Professor Stansbury points out that this is not an independent ground of objection to hearsay.

²³ MCCORMICK, EVIDENCE § 224; 5 WIGMORE, EVIDENCE § 1362; STANSBURY, N. C. EVIDENCE § 139.

²⁴ 5 WIGMORE, EVIDENCE § 1367. "If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." *Ibid.*

²⁵ *Id.* § 1427.

²⁶ Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, (1937). "... The present law as to hearsay is a conglomeration of inconsistencies due to the application of competing theories haphazardly applied." MODEL CODE OF EVIDENCE 46 (1942).

ing firsthand evidence voices a high ideal, but one that is constantly compromised in everyday life.²⁷ Not only is this true, but under the numerous exceptions to the rule, "it seems doubtful that of the hearsay evidence which is offered in court more is actually inadmissible than is admissible." He suggests that what we really have is a cautionary policy about hearsay rather than a rigid rule against it.²⁸ Yet, it is clear that the hearsay rule is often enforced as a rigid rule.

Stansbury writes that the different exceptions have "been developed at different times and irregularly, in response to different needs of the occasion, with the result that their outlines in many cases are artificial, including within the boundaries some quite unreliable bits of evidence and excluding others which an investigation unhampered by precedent would disclose to be unusually trustworthy. There is perhaps no other part of the law of evidence in which reform is so badly needed."²⁹

There are today twenty or more exceptions to the hearsay rule depending on the system of classification used. They represent the situations occurring in cases where courts have concluded that for some reason the second-best report was good enough. Having been improvised during the heat of trials, there is little consistency in their statement or reasons. The scope of an exception is "a matter settled by precedent and frequently by some accidental or casual circumstance involved in an early case rather than the fundamental reason for the exception."³⁰ Much worthless evidence will fit the categories; much that is vitally needed will be left out. A broader and more practical method is needed.³¹

Most of the information on which ordinary activities depend is hearsay. The most vital decisions affecting human life and property made outside the courtroom are made on the basis of secondhand reports. This leads to the conclusion that the average person has a considerable body of experience in evaluating the reliability of hearsay. Also, it is safe to say that most persons will not rely on such information if more trustworthy firsthand sources are available. Thus, it may be concluded that where firsthand information is not available and where experience indicates that the secondhand type is fairly reliable, then the hearsay rule should not force the exclusion of the extrajudicial statement. True, most of the exceptions are roughly based on these ideas of necessity and

²⁷ McCORMICK, EVIDENCE § 300; McCormick, *Tomorrow's Law of Evidence*, 24 A. B. A. J. 507 (1938).

²⁸ McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559, 561 (1955).

²⁹ STANSBURY, N. C. EVIDENCE § 144.

³⁰ Hinton, *Changes in the Exceptions to the Hearsay Rule*, 29 ILL. L. REV. 422 (1934).

³¹ McCORMICK, EVIDENCE § 300.

trustworthiness, but they do not cover the field nor is that which they do cover always within such bounds.

There is a special problem as to the use of hearsay in nonjury proceedings before courts and administrative agencies. A good argument can be made that the rule should be completely abandoned when there is no jury to be misled by the absence of cross-examination. This is recognized by considerable relaxation of the rule in many such instances.³² There is also a problem as to whether an extension of the use of hearsay can be constitutionally applied to criminal cases in view of the right to confrontation, though that right is usually held subject to the hearsay exceptions at the present time.³³

Other students of the law of evidence have joined in the chorus advocating reform.³⁴ As early as 1898, Massachusetts adopted a statute which banished some of the hearsay rule from that jurisdiction.³⁵ The English Evidence Act of 1938 contained a somewhat different but equally potent inroad on the rule.³⁶ Thus it was surprising that the hearsay provisions of the *Model Code of Evidence*, hailed by the scholars, should have received such a cool reception from the judges and the bar. It was the increased use of hearsay permitted under the *Model Code* which became a major ground of opposition to it. What a pity that the Europeans have had to get along without a hearsay rule.³⁷

III

HEARSAY DEFINED

The traditional definition of hearsay in North Carolina is as follows: "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it."³⁸ The formulation used by most courts and commentators is that it is evidence

³² *Maley v. Furniture Co.*, 214 N. C. 589, 200 S. E. 438 (1939); N. C. GEN. STAT. § 96-4 (p) (1955); N. C. GEN. STAT. § 150-18 (1955); STANSBURY, N. C. EVIDENCE § 4; Note, 19 N. C. L. REV. 568 (1941); Comment, 46 ILL. L. REV. 915 (1952).

³³ WIGMORE, EVIDENCE §§ 1397, 1398.

³⁴ MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 147-165 (1947); James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788 (1940). Some experts have even considered abolition of the rules of evidence. 1 WIGMORE, EVIDENCE § 8c; Chafee, *The Progress of the Law, 1919-1921: Evidence*, 35 HARV. L. REV. 302 (1922).

³⁵ It now reads as follows: "In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant." MASS. ANN. LAWS c. 233, § 65 (1954).

³⁶ 1 & 2 GEO. 6, c. 28, sec. 1.

³⁷ Hammelmann, *Hearsay Evidence, A Comparison*, 67 L. Q. REV. 67 (1951).

³⁸ *Randle v. Grady*, 228 N. C. 159, 45 S. E. 2d 35 (1947); *Teague v. Wilson*, 220 N. C. 241, 17 S. E. 2d 9 (1941); *Chandler v. Jones*, 173 N. C. 427, 92 S. E. 145 (1917).

of a statement made out of court which is offered to prove the truth of the matter asserted therein. The competency and credibility of the absent declarant are not involved unless the extrajudicial statement is offered to prove the truth of the matter asserted therein.³⁹ So it can be said that the earmarks of hearsay locally are the same as those which exist generally.

Should nonverbal conduct of a person not in court be regarded as hearsay? If such conduct is intended as an assertion of fact by the actor then it should be so considered. The difficulty is with conduct which was not intended to be assertive by the actor. There are cases in North Carolina which exclude such nonassertive conduct as hearsay and others which do not.⁴⁰ There is a good argument that the credibility of the extrajudicial actor is not involved to the same extent in nonassertive conduct, including silence, as in oral or written statements and conduct intended to be assertive.⁴¹ The majority rule is that such nonassertive conduct ought to be excluded as hearsay wherever an express assertion of the same import would be excluded.⁴² Thus, an accused cannot put in evidence that another fled when accused of the crime.⁴³ The *Uniform Rules* provide that nonassertive conduct is not within the operation of the rule against hearsay.⁴⁴ This is distinguished from assertive conduct which is intended by the actor "as a substitute for words in expressing the matter stated."⁴⁵ Such assertive conduct has all the dangers of verbal hearsay; consider, for example, the sign language of the dumb. Yet, nonassertive conduct would seem to have so little of the danger which supports the rule against hearsay as to justify the position of the *Uniform Rules* in treating it as just another kind of circumstantial evidence which may be excluded if irrelevant.⁴⁶

The *Uniform Rules*, then, defines "statement" as oral or written

³⁹ McCORMICK, EVIDENCE § 225; WIGMORE, EVIDENCE § 1361. If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay. STANSBURY, N. C. EVIDENCE § 138; *In re Will of Duke*, 241 N. C. 344, 85 S. E. 2d 332 (1955); *Woodard v. Mordecai*, 234 N. C. 463, 67 S. E. 2d 639 (1951); *State v. Black*, 230 N. C. 448, 53 S. E. 2d 443 (1949).

⁴⁰ E.g., *Hinson v. Morgan*, 225 N. C. 740, 36 S. E. 2d 266 (1945) (Excluded.); *Maynard v. Holder*, 219 N. C. 470, 14 S. E. 2d 415 (1941) (Admitted); STANSBURY, N. C. EVIDENCE § 142.

⁴¹ McCORMICK, EVIDENCE § 229; Murchison, *Silence as Hearsay*, 24 N. C. L. REV. 274 (1946).

⁴² *Wright v. Tatham*, 7 Ad. & Ell. 313 (Ex. Ch. 1837), *aff'd*, 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H. L. 1838); Falknor, *Silence as Hearsay*, 89 U. OF PA. L. REV. 92 (1941); McCormick, *The Borderland of Hearsay*, 39 YALE L. J. 489 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1 (1937); Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

⁴³ *State v. Steward*, 189 N. C. 340, 127 S. E. 260 (1925); *State v. White*, 68 N. C. 158 (1872); *State v. May*, 15 N. C. 328 (1833).

⁴⁴ UNIFORM RULES OF EVIDENCE, rules 62 (1) and 63.

⁴⁵ *Id.*, rule 62 (1).

⁴⁶ *Id.*, rules 1 (2), 7, and 45.

expressions and conduct intended to be assertive. Rule 63 provides that "evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible," subject to exceptions. In making the hearsay rule exclude statements only when offered as proof of what was asserted, the *Uniform Rules* follow Wigmore.⁴⁷ "When the *making* of the statement, as distinguished from its truth, is relevant or material, the credit of the speaker is not involved, and hence cross-examination of the speaker would be of no aid in appraising the evidence. In such case the only question is whether he *made* the statement; all that is necessary or helpful, therefore, is cross-examination of the witness who testifies that the statement was made."⁴⁸

The basic rule against hearsay provided in the *Uniform Rules* is, then, the traditional rule and the rule as known in North Carolina,⁴⁹ except that the uncertainty concerning nonassertive conduct is removed as has been recommended by most authorities. The statement of the hearsay rule is followed in the *Uniform Rules* by 31 exceptions.

IV

PRIOR STATEMENTS OF WITNESSES

One of the most important changes which the *Uniform Rules* would effect concerns extrajudicial statements of persons who are now present in court and subject to cross-examination. By the majority view, the fact that one who made declarations out of court is now in court as a witness does not make the declarations any the less hearsay.⁵⁰ It is true, of course, that prior inconsistent statements may be admissible for the limited purpose of impeaching a witness,⁵¹ and that prior consistent statements may be admitted in order to corroborate a witness,⁵² pro-

⁴⁷ 6 WIGMORE, EVIDENCE § 1766. The use of memoranda to refresh the memory of a witness does not involve the hearsay rule. *State v. Peacock*, 236 N. C. 137, 72 S. E. 2d 612 (1952); *Steele v. Cox*, 225 N. C. 726, 36 S. E. 2d 288 (1945); STANSBURY, N. C. EVIDENCE § 32.

⁴⁸ Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. REV. 43, 48 (1954).

⁴⁹ *Memory v. Wells*, 242 N. C. 277, 87 S. E. 2d 497 (1955); *Freeman v. Ponder*, 234 N. C. 294, 67 S. E. 2d 292 (1951); *State v. Benson*, 234 N. C. 263, 66 S. E. 2d 893 (1951); *State v. Gavin*, 232 N. C. 323, 59 S. E. 2d 823 (1950); *State v. Black*, 230 N. C. 448, 53 S. E. 2d 443 (1949); *Randle v. Grady*, 228 N. C. 159, 45 S. E. 2d 35 (1947); *Williams v. Young*, 227 N. C. 472, 42 S. E. 2d 592 (1947); *State v. Gardner*, 226 N. C. 310, 37 S. E. 2d 913 (1946); *Hinson v. Morgan*, 225 N. C. 740, 36 S. E. 2d 266 (1945); STANSBURY, N. C. EVIDENCE § 138 n. 6.

⁵⁰ MCCORMICK, EVIDENCE § 39; Annot., 133 A. L. R. 1454 (1941).

⁵¹ *Piper v. Ashburn*, 243 N. C. 51, 89 S. E. 2d 762 (1955); *Perkins v. Clarke*, 241 N. C. 24, 84 S. E. 2d 251 (1954); *State v. Cope*, 240 N. C. 244, 81 S. E. 2d 773 (1954); *Cotton Co. v. Ford*, 239 N. C. 292, 79 S. E. 2d 389 (1954); *Harris v. Burgess*, 237 N. C. 430, 75 S. E. 2d 248 (1953); STANSBURY, N. C. EVIDENCE § 46; McCormick, *The Turncoat Witness*, 25 TEXAS L. REV. 573 (1947).

⁵² *Gibson v. Whitton*, 239 N. C. 11, 79 S. E. 2d 196 (1953); *State v. Davis*, 229 N. C. 386, 50 S. E. 2d 37 (1948); *State v. Gentry*, 228 N. C. 643, 46 S. E. 2d

vided there has been some attack on his credibility, but in neither case is the prior statement to be given any substantive significance under the prevailing rule. This means that, on request, the judge will instruct the jury not to consider the prior statement as substantive evidence.

Rule 63 (1) of the *Uniform Rules* provides for a new exception to the hearsay rule. It provides that "a statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness," shall be admitted. This was the position of the *Model Code of Evidence*.⁵³

Conceding that the right of cross-examination is the main reason for the rule against hearsay, this exception would seem to be an "enlightened modification of the rule. . . ."⁵⁴ The right of confrontation is not impaired. Objection might be made on the ground that the prior statement was not made under oath, but the fact that the witness is under oath at the hearing weakens this contention which is based on a requirement no longer regarded as a fundamental support of the hearsay rule. Whether the prior statement is consistent or inconsistent with the declarant's present testimony, it is hard to escape the conclusion that the availability of the declarant for cross-examination ought to remove any hearsay taint.⁵⁵ Actually, if present testimony is admissible notwithstanding hearsay considerations because the witness is subject to cross-examination, it would seem that prior statements are in an almost equally good position. It has even been argued that the prior statements are more reliable than the present testimony because, in addition to the declarant's being subject to cross-examination, the prior statements are nearer in time to the event when the witness' recollection would have been better.⁵⁶ Especially if the prior statements are inconsistent, it is well to consider that not only is there more likelihood of memory defects with the present testimony but there has also been more opportunity for corruption and bias to enter the picture.

Wigmore favored the prevailing view in the first edition of his monumental treatise. In the third edition, however, he took the position that prior statements of witnesses should be considered as substantive evi-

863 (1948); *Humphries v. Coach Co.*, 228 N. C. 399, 45 S. E. 2d 546 (1947); *State v. Litteral*, 227 N. C. 527, 43 S. E. 2d 84 (1947); *State v. Walker*, 226 N. C. 458, 38 S. E. 2d 531 (1946); *State v. Bennett*, 226 N. C. 82, 36 S. E. 2d 708 (1946); STANSBURY, N. C. EVIDENCE §§ 51, 52.

⁵³ Rule 503 (b).

⁵⁴ UNIFORM RULES OF EVIDENCE, rule 63 (1), Comment.

⁵⁵ "Prior statements are not like ordinary hearsay. The one who made them is before the jury and is subject to cross examination about them. . . ." Chief Judge Parker in *Beaty v. United States*, 203 F. 2d 652 (4th Cir. 1953).

⁵⁶ MCCORMICK, EVIDENCE § 39; McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559, 562 (1955).

dence. "There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has already been satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve."⁵⁷ McCormick contends that the rule against the use of prior statements "is basically misguided . . . in attempting to deny such statements the full probative force to which they are reasonably entitled."⁵⁸ Other experts in the field have attacked the orthodox view.⁵⁹

The impotency of the present rule is revealed in its sanction. If the prior statement is admitted to impeach or corroborate the witness, the adversary is entitled to an instruction that the jury must not consider the prior statement as substantive evidence but solely as bearing on the credibility of the witness. This verbal distinction is one that "is not easily appreciated by a jury."⁶⁰ In the case of a prior inconsistent statement, for example, it might even cause some lawyers momentary difficulty to evaluate the credibility of a witness without deciding which of his two accounts is true. Having decided that the prior statement is true, is it psychologically possible to then disregard both statements?

Whenever a witness has testified to some fact inconsistent with his prior statement, the prior statement is admissible for impeachment in North Carolina.⁶¹ In addition, North Carolina is perhaps the most liberal of the jurisdictions in freely admitting prior consistent statements to corroborate a witness. The rule generally followed is that such a statement is not admissible to support the credibility of the witness except when the witness has been subjected to specific types of direct impeachment.⁶² North Carolina, however, will admit the prior consistent statement when there has been any attack on the veracity of the witness.⁶³ Mere cross-examination of the witness is enough to permit the proponent to enter prior consistent statements on

⁵⁷ 3 WIGMORE, EVIDENCE § 1018.

⁵⁸ MCCORMICK, EVIDENCE § 39.

⁵⁹ MAGUIRE, *op. cit. supra*, note 34, 59; MODEL CODE OF EVIDENCE 234 (1942) (Comment of Professor Morgan). The English Evidence Act of 1938 makes admissible, as proof of the fact stated, any prior *written* statement of a witness with personal knowledge. 1 & 2 GEO. 6, c. 28, sec. 1. Though the great weight of authority is against the proposed change, it is followed in at least one state. *State v. Jolly*, 112 Mont. 352, 116 P. 2d 686 (1941).

⁶⁰ *Medlin v. County Board of Education*, 167 N. C. 239, 83 S. E. 483 (1914). Clark, C. J., wrote: "... the jury could not have been prejudicially affected by the distinction which they could not be expected to comprehend, between impeaching evidence by reason of a contradictory statement which lessens the weight of witness's testimony and calling such contradictory statement substantive evidence."

⁶¹ *Perkins v. Clarke*, 241 N. C. 24, 84 S. E. 2d 251 (1954); *Hopkins v. Colonial Stores*, 224 N. C. 137, 29 S. E. 2d 455 (1944). This is subject, of course, to the requirement that a foundation be laid in certain instances before impeachment by prior inconsistent statement. STANSBURY, N. C. EVIDENCE § 48.

⁶² MCCORMICK, EVIDENCE § 49; 4 WIGMORE, EVIDENCE §§ 1104 *et seq.*

⁶³ STANSBURY, N. C. EVIDENCE § 50, 51.

the corroboration theory.⁶⁴ It makes no difference whether the statements were made before or after the controversy arose nor whether oral or written. The witness may even testify to his own prior consistent statements.⁶⁵ This liberality, however, has not resulted in the overthrow of the orthodox rule limiting the use of such statements.⁶⁶

Thus, it is clear that prior statements of witnesses, whether consistent or inconsistent, have no serious hurdles to cross under the present rule in gaining admission into evidence. The time-honored verbal ritual is recited for the benefit of the jury if the adversary makes a proper request for it, the judge no longer having a duty to give such an instruction in the absence of a request as was once the case.⁶⁷ ". . . Nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the applicant asks at the time of admission, that its purpose shall be restricted."⁶⁸ The prior statements are usually admitted, then, under the present rule, the only consequence being that the jury is given the psychologically impossible task of considering and not considering the statements.

It is often the case that prior consistent statements add very little to the witness's testimony in court. If the proposed exception is adopted, it might be argued that the present ease with which such statements gain admission ought to be changed. If so, such a limitation is provided in the *Uniform Rules* by Rule 45 which enables the trial judge to exclude otherwise admissible evidence "if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered." It is obvious that the question of probative value would be less serious in the case of prior inconsistent statements. The conflict with testimony at the trial would usually indicate probative value.

Cross-examination of the declarant at the trial may be more valuable

⁶⁴ *Gibson v. Whitton*, 239 N. C. 11, 79 S. E. 2d 196 (1953); *State v. Litteral*, 227 N. C. 527, 43 S. E. 2d 84 (1947) (This was a rape case where it was stated that the credibility of the prosecuting witness was put in issue by the defendant's plea of not guilty and his cross-examination of her so that prior consistent statements of the witness were admissible); *State v. Bennett*, 226 N. C. 82, 36 S. E. 2d 708 (1946); *State v. Gore*, 207 N. C. 618, 178 S. E. 209 (1935). Corroborative evidence may even be admitted in *advance* of the witness' testimony. *State v. Sutton*, 225 N. C. 332, 34 S. E. 2d 195 (1945).

⁶⁵ STANSBURY, N. C. EVIDENCE § 51.

⁶⁶ See note 52 *supra*.

⁶⁷ *State v. Parker*, 134 N. C. 209, 46 S. E. 511 (1903).

⁶⁸ N. C. SUPREME CT. RULE 21. See *Harris v. Burgess*, 237 N. C. 430, 75 S. E. 2d 248 (1953); *State v. Gentry*, 228 N. C. 643, 46 S. E. 2d 863 (1948); *Humphries v. Coach Co.*, 228 N. C. 399, 45 S. E. 2d 546 (1947); *State v. Walker*, 226 N. C. 458, 38 S. E. 2d 531 (1946); *State v. Britt*, 225 N. C. 364, 34 S. E. 2d 408 (1945); *State v. Sutton*, 225 N. C. 332, 34 S. E. 2d 195 (1945).

in testing prior consistent statements than prior inconsistent statements. Since the prior consistent statement agrees with the courtroom testimony of the witness, presumably his memory and knowledge of it will permit an adequate testing by cross-examination. This is not always true with prior inconsistent statements. If the witness concedes he made the inconsistent statement and remembers it, then cross-examination should work well, but what if he denies having made it or claims that he does not remember the event in question? The best answer is, probably, that cross-examination will not be effective in thoroughly analyzing the prior statements but that the denials and assertions of lack of memory by the witness are themselves considered among the best fruits of cross-examination. If the jury believes them, it may give full credit to the courtroom testimony of the witness; if not, it may, under the proposed exception, accord substantive significance to the prior inconsistent statements.

In *State v. Peacock*,⁶⁹ the defendant objected to the use of notes by police officers while they were testifying against him. It was held that the officers could use the notes for the purpose of refreshing their memories, though the notes could not be read to the jury. This is the usual application of the device of refreshing the memory of a witness. Under the proposed exception, however, the notes could have been read to the jury as the officer who wrote them was present at the hearing and available for cross-examination by the defendant. Why shouldn't they be read to the jury? The jury will hear the later version of the refreshed witness under the refreshing principle anyway, which, it certainly can be argued, is less reliable than the statement written down at a time when the memory of the officer was clearer. To the objection that the prior statement was not subject to cross-examination, the simple answer is that the witness who wrote it is present and available for such a testing.

In *State v. Kimmer*,⁷⁰ the State put warrants into evidence against a defendant charged with breaking and entering and larceny which contained statements of complainants as to the property allegedly taken. It was held that these prior statements were erroneously admitted since they did not corroborate the testimony of the complainants at the trial. They would have been admissible as substantive evidence under the proposed exception, and cross-examination of the witnesses who made them could have resolved any conflict with their testimony at the trial.

In *Freeman v. Ponder*,⁷¹ oral and written prior statements of witnesses in a case concerning a contested election were offered on the theory that they corroborated the witness. Since the witnesses were

⁶⁹ 236 N. C. 137, 72 S. E. 2d 612 (1952).

⁷⁰ 234 N. C. 448, 67 S. E. 2d 343 (1951).

⁷¹ 234 N. C. 294, 67 S. E. 2d 292 (1951).

available for cross-examination at the trial, it would seem that no real harm could have resulted had they been given substantive significance. Actually, one was held to have been properly excluded because the objection to it was general. Had it been admissible generally, such an objection would have been untenable.

In *State v. Bagley*,⁷² prior statements of witnesses for the State were introduced by the State. They were inconsistent with the testimony of these witnesses at the trial and, therefore, were held to have been erroneously admitted because they tended to impeach the witnesses of the State rather than to corroborate them. The *Uniform Rules* abolish the rule against impeaching one's own witness.⁷³ Since, however, the proposed exception would admit as substantive evidence these prior statements of witnesses present at the hearing and available for cross-examination by the defendant, the court would not be concerned with the impeaching use of such statements if the proposal were to be adopted.

It is submitted that in all these cases, the search for truth would be facilitated and no real harm would result from according substantive significance to these prior statements. The jury will often hear them anyway, and adverse counsel would be encouraged to conduct a more vigorous cross-examination of the witness who uttered the prior statements if he could not rely on a limiting instruction from the judge, an instruction which is so manifestly lacking in real utility. Nearly all would agree that imaginative cross-examination makes more of an impression on a jury than an instruction which embodies such a difficult distinction. One is even tempted to wonder if the application of the rule against hearsay to prior statements of witnesses might be the result of some historical accident, mistake, or inadvertence, since it is so clearly not within the reason of the rule. One might even agree with the Commissioners who commented that the main basis for the rule today is sentiment.⁷⁴

V

EXCITED UTTERANCES AND CONTEMPORANEOUS STATEMENTS

The exception for prior statements of witnesses is one, of course, which does not require unavailability of the declarant before the hearsay statements will be admissible. It is felt that it may facilitate the con-

⁷² 229 N. C. 723, 51 S. E. 2d 298 (1949).

⁷³ UNIFORM RULES OF EVIDENCE, rule 20. This rule of evidence has no reason but history to support it. It has been condemned by many judges and commentators. STANSBURY, N. C. EVIDENCE § 40, n. 92. The North Carolina General Assembly recently modified to some extent the full-blown rule formerly in effect. "A party who calls an adverse party as a witness shall be allowed to cross-examine him in the same manner as any other witness and may contradict him but may not impeach his credibility except by the showing of prior inconsistent statements upon proper foundation laid." N. C. GEN. STAT. § 8-50 (1955).

⁷⁴ UNIFORM RULES OF EVIDENCE rule 63 (1), Comment.

sideration of the exceptions to the hearsay rule if some of the other exceptions which likewise do not require unavailability are covered at this point. Some rather striking changes are proposed dealing with unavailability considerations, and so those exceptions which require unavailability of the declarant will, in general, be covered after those exceptions which do not have such a requirement. The declarant will always be available in the prior statements exception; that is not necessarily the case with the exceptions now to be considered. With excited utterances and contemporaneous statements, the status of the declarant as to availability has no bearing.

The term *res gestae* has been used by many courts to include the exceptions for excited utterances and contemporaneous statements. It has also been used to include declarations accompanying and characterizing other conduct (the so-called verbal act doctrine)⁷⁵ and statements relating to the declarant's mental or physical condition.⁷⁶ It has been pointed out that the use of "*res gestae*" has introduced confusion because it covers principles which are quite distinct.⁷⁷ Declarations accompanying and characterizing other conduct are not properly considered as hearsay because they are not offered to prove the truth of the matters asserted. Statements relating to the declarant's mental or physical condition are treated as a separate exception to the hearsay rule in the *Uniform Rules*.⁷⁸

The exception for excited utterances covers statements uttered under stress of nervous excitement produced by a startling event before the declarant has had a chance for reflection or fabrication. The factor which supplants the test of cross-examination is the excitement which suspends other interests of the declarant. It has been contended that to have this exception there must have been a startling event sufficient to produce nervous excitement; an utterance made while the nervous excitement was still dominant; and a relation between the utterance and the startling event.⁷⁹ The essential requirement is the excitement flowing from the startling event. The declarant need not have been a participant in the event, the declaration of a by-stander qualifying. It is not necessary that the declarant be unavailable. He may testify to his own excited utterance. If the declarant is unavailable, the admission of the hearsay statement is necessary if it is to be considered at all. If the excited utterance was made by an available declarant, it is admitted

⁷⁵ *Cotton Mills, Inc. v. Abrams*, 231 N. C. 431, 57 S. E. 2d 803 (1950); *Safie Manufacturing Co. v. Arnold*, 228 N. C. 375, 45 S. E. 2d 577 (1947); STANSBURY, N. C. EVIDENCE § 159.

⁷⁶ STANSBURY, N. C. EVIDENCE §§ 158 and 161.

⁷⁷ STANSBURY, N. C. EVIDENCE § 158.

⁷⁸ UNIFORM RULES OF EVIDENCE, rule 63 (12). The exception recognized in the UNIFORM RULES is that accepted in North Carolina and elsewhere.

⁷⁹ MCCORMICK, EVIDENCE § 272; 6 WIGMORE, EVIDENCE § 1750.

because the statement uttered in the heat of excitement is considered more reliable than the present testimony of the declarant. This exception is recognized by the *Uniform Rules* and is defined as a statement which the judge finds was made while the declarant was under the stress of nervous excitement caused by perceiving the event or condition which the statement narrates, describes or explains.⁸⁰

Another exception which some courts have recognized and which has been advocated by some experts covers statements accompanying essential element is that the statement be contemporaneous with the event. This time factor supplies the reliability which supplants the test of cross-examination. Excitement is not the guaranty of trustworthiness in this situation. It is reasoned that the statement is free from any defect of memory because it was made at the moment the event was observed. Being casually uttered in the absence of excitement may add to its trustworthiness. Also, there was no time for fabrication, and the statement was usually made to another who has his own opportunity to observe and thus to detect any errors in the statement.⁸¹ Without the factor of excitement, such utterances have not been as readily recognized as exceptions to the rule against hearsay, and it has even been proposed that such declarations only be admitted when the declarant is unavailable.⁸² This exception is, however, recognized by the *Uniform Rules*. A statement is admissible as an exception "which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains. . . ."⁸³

While often an excited utterance will also be contemporaneous with the event described, this is not necessarily the case. The declarant may remain excited and make such an utterance concerning the event after it is over. Similarly, the declarant may never get excited and yet make statements which are contemporaneous with the event described. The two situations are distinguishable, though the courts have usually spoken in terms of *res gestae* and made no effort to identify the two different considerations, though both, or one and not the other, might have been involved.

North Carolina recognizes both these exceptions. Some cases emphasize the requirement of excitement and spontaneity.⁸⁴ Others insist upon the statement being exactly contemporaneous with the event de-

⁸⁰ UNIFORM RULES OF EVIDENCE, rule 63 (4) (b).

⁸¹ MCCORMICK, EVIDENCE § 273; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L. J. 229 (1922). But see 6 WIGMORE, EVIDENCE § 1757. "To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle. . . ."

⁸² *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 N.W. U. L. REV. 481, 487 (1954).

⁸³ UNIFORM RULES OF EVIDENCE, rule 63 (4) (a).

⁸⁴ STANSBURY, N. C. EVIDENCE § 164 n. 61.

scribed.⁸⁵ Some statements have been excluded which seemed to possess both the qualities of excitement and contemporaneousness.⁸⁶

The North Carolina Court has at times indicated that the utterance must be both excited and contemporaneous with the event. "For a declaration to be competent as part of the *res gestae*, at least three qualifying conditions must concur: (a) the declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication . . . ; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom . . . ; and (c) must have some relevancy to the fact sought to be proved. . . . They are called 'verbal facts' or 'verbal acts. . . .' If not of this character its mere nearness to the transaction in point of time has no significance."⁸⁷ In the case where this was written, a child was suing for an injury received in an automobile accident. A witness of the defendant would have testified that within two minutes after the injury, the child's mother came up to the scene half-crying and said: "I have told her about crossing that highway a number of times." The defendant contended that this extrajudicial statement bore on the issue of the plaintiff's contributory negligence. It was held to have been properly excluded. Even conceding that the case is weak as to the utterance being contemporaneous with the event, excitement would seem to have been present.

On the other hand, in *State v. Smith*⁸⁸ where the defendant was convicted of arson, a witness for the State testified that she heard a noise at the back corner of her house, opened the door and there saw the defendant who ran into a cornfield. In a few minutes fire was discovered in the corner of the house on the outside, and she exclaimed: "Lord, have mercy, Ernie has set the house afire." This utterance was held properly admitted over the objection of the defendant on the theory that it was part of the *res gestae*. Exact contemporaneousness is lacking, yet the excited quality of the utterance was apparently determinative.

⁸⁵ *Id.*, n. 62. For a case which disregards any requirement of excitement in connection with a contemporaneous utterance, see *State v. Dills*, 204 N. C. 33, 167 S. E. 459 (1933). "The statement of a bystander or nonparticipant, if made while a thing is being done, that is, if contemporaneous and explanatory, is generally admissible in evidence."

⁸⁶ *Swinson v. Nance*, 219 N. C. 772, 15 S. E. 2d 284 (1941). This case concerned an automobile collision. A witness for the defendant, while perceiving the car in which the plaintiffs were riding approach the intersection, exclaimed to her sister: "Gosh, why don't they slow up." The statement was stricken at the trial, and this exclusion was not held to be reversible error on appeal. Defendant contended that it was a spontaneous exclamation and part of the *res gestae*, but the opinion stated that it was doubtful whether the declaration was "so clear in its implication as to qualify under the rule."

⁸⁷ *Coley v. Phillips*, 224 N. C. 618, 31 S. E. 2d 757 (1944).

⁸⁸ 225 N. C. 78, 33 S. E. 2d 472 (1945).

By contrast, in an automobile negligence case, it was held proper to admit the testimony of a witness who testified that she looked in her rear-view mirror shortly after the defendant's car passed her car and said: "That car hit the truck."⁸⁰ In this case, the contemporaneous quality of the utterance would seem to be controlling, for there is nothing in the statement to indicate excitement. Similarly, in a prosecution for breaking and entering and assault with intent to commit rape, the prosecuting witness was allowed to testify that she called her nephew, whom she knew was not in the house, in order to frighten the defendant.⁹⁰ This was held competent as part of the *res gestae*, and the contemporaneous quality appears to have been determinative. But contrast *State v. Litteral*,⁹¹ a rape case, where the cry for help of the victim after she had been left in a field by the defendants was held admissible on the theory that it was a spontaneous utterance. It may be conceded that it was an excited utterance, but the contemporaneous feature would seem to be weak.

Lumping the exceptions under consideration together with verbal acts and statements of the declarant's mental or physical condition under the term "*res gestae*" would be confusing enough, but another type of extrajudicial utterance, which involves distinct problems of its own, is also given this designation in North Carolina. This is the statement of an agent or employee offered against his principal as a vicarious admission. It has been held that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment is admissible against the principal or employer, but what he says afterwards is only hearsay and not admissible.⁹² The latter type of utterance is considered not to be within the *res gestae* principle. The use of the term *res gestae* in connection with such admissions has been criticized.⁹³ The *Uniform Rules* deal with them in a separate rule.⁹⁴

The *Uniform Rules* would introduce a welcome clarification in the *res gestae* area, if enacted. In particular, Rule 4 (a) and (b) would

⁸⁰ *Adcox v. Austin*, 235 N. C. 591, 70 S. E. 2d 837 (1952).

⁹⁰ *State v. Cogdale*, 227 N. C. 59, 40 S. E. 2d 467 (1946).

⁹¹ 227 N. C. 527, 43 S. E. 2d 84 (1947).

⁹² *Lee v. Atlantic Coast Line R. R.*, 237 N. C. 357, 75 S. E. 2d 143 (1953); *Gassaway v. Gassaway & Owen, Inc.*, 220 N. C. 694, 18 S. E. 2d 120 (1942); *Brown v. Montgomery Ward Co.*, 217 N. C. 368, 8 S. E. 2d 199 (1940); STANSBURY, N. C. EVIDENCE, § 169.

⁹³ MCCORMICK, EVIDENCE § 244; STANSBURY, N. C. EVIDENCE § 164; Note, 7 N. C. L. REV. 74 (1928).

⁹⁴ Such statements would be more freely admissible under the proposed definition: "As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship. . . ." UNIFORM RULES OF EVIDENCE, rule 9. Discussion of this exception is under Admissions, *infra*.

invite separate treatment of excited utterances and contemporaneous statements, respectively, though if both requirements were found to be present the statement would, of course, be admissible. By dealing with the other principles usually lumped together under the *res gestae* label as separate exceptions to the hearsay rule, this "troublesome expression" could be retired to the limbo of outworn conceptions.⁹⁵

VI

CONFESSIONS, ADMISSIONS, AND DECLARATIONS AGAINST INTEREST

Common threads knit these exceptions together in the *Uniform Rules*. One is the lack of any requirement that the declarant be unavailable. Another is that such statements are almost always against the interest of the declarant. This is obvious with declarations against interest, but it is true with confessions and admissions because, as a practical matter, they would not be offered were they not against the interest of the party against whom offered at the trial. It is true, of course, that an admission need not necessarily be against the interest of the declarant when made as is the case with a declaration against interest. A confession is a particular type of admission.

Confessions. Rule 63 (6) defines confessions which are admissible as an exception to the rule against hearsay: "In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same." This

⁹⁵ "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.' It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking." Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L. J. 229 (1922). "It is perhaps unfortunate that the phrase was ever invented, since its inconsistent meaning and miscellaneous application tend to confuse principles which are in reality quite distinct." STANSBURY, N. C. EVIDENCE § 158. Wigmore was similarly critical. "The phrase '*res gestae*' is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. . . . It should never be mentioned." 6 WIGMORE, EVIDENCE § 1767.

is basically the principle which is now recognized in North Carolina, but it differs in some particulars.

A confession is a species of voluntary admission, consisting in a direct acknowledgment of guilt of a criminal charge.⁹⁶ Such a confession is freely admissible, though it was recently held that there must be other evidence which at least establishes the corpus delicti in order for the evidence to be sufficient to sustain a conviction of a felony.⁹⁷ One particular in which the proposed rule differs from the local rule is its adoption of the rule of *Ashcraft v. State of Tennessee*.⁹⁸ This is found in the provision that a confession is admissible if the judge finds that the accused when making the statement was not, among other things, under compulsion "by prolonged interrogation under such circumstances as to render the statement involuntary. . . ." Prolonged interrogation alone has not been held to make a confession involuntary in the past.⁹⁹

Another departure from local law is the provision that a confession will be inadmissible if induced by infliction or threats of infliction of suffering upon the accused *or another*. For example, threats to a member of the family of the accused may render the confession involuntary.¹⁰⁰ Also, note that the "suffering" is not denominated physical, making it possible for the judge to find that infliction or threats of infliction of mental suffering render the statement involuntary. There is also a departure in that the statement need not be a direct acknowledgment of guilt of the criminal charge, but only need be a previous statement relative to the offense charged. The orthodox rule is that the protections thrown up around alleged confessions do not apply to exculpatory statements or to admissions relevant but colorless with reference to actual guilt.¹⁰¹ Much can be said for this proposed change. Even though the accused is only forced to concede a relevant though in itself a colorless fact, it seems that the admission ought to be granted the protections accorded confessions, since if it is relevant it may lead to a conviction.¹⁰²

⁹⁶ *State v. Marsh*, 234 N. C. 101, 66 S. E. 2d 684 (1951); *State v. Speller*, 230 N. C. 345, 53 S. E. 2d 294 (1949); *State v. Litteral*, 227 N. C. 527, 43 S. E. 2d 84 (1947); *State v. Bennett*, 226 N. C. 82, 36 S. E. 2d 708 (1946); STANSBURY, N. C. EVIDENCE § 182 n. 1.

⁹⁷ *State v. Cope*, 240 N. C. 244, 81 S. E. 2d 773 (1954). This was said to be particularly true in prosecutions for sexual offenses. *State v. Cowan*, 29 N. C. 239 (1847) had indicated that a conviction could be had upon the defendant's confession alone, even in capital cases. See *State v. Thomas*, 241 N. C. 337, 85 S. E. 2d 300 (1955) where the State met the requirement concerning other evidence.

⁹⁸ 322 U. S. 143 (1944). The decision in this case was based on the due process clause of the Fourteenth Amendment and is, therefore, already law in all the states. See Note, 32 N. C. L. REV. 98 (1953).

⁹⁹ STANSBURY, N. C. EVIDENCE § 184; Note, 28 N. C. L. REV. 390 (1950).

¹⁰⁰ UNIFORM RULES OF EVIDENCE, rule 63 (6), Comment.

¹⁰¹ 3 WIGMORE, EVIDENCE § 821.

¹⁰² Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. REV. 43, 68 (1954).

Here is an instance where less rather than more evidence will be admitted under the *Uniform Rules*. It is well to note that confessions involve policy considerations which go considerably beyond the usual hearsay exception criteria.

Admissions. As to admissions of a party, the Uniform Rules adopt the common law rule.¹⁰³ As expressed in North Carolina, anything a party to the action has said, if relevant to the issues, is admissible against him.¹⁰⁴ It makes no difference that the statements are not made upon the personal knowledge of the party.¹⁰⁵ The reason for this exception to the hearsay rule is simply that it would be irrational to permit a party to object to the reception of his own declarations on the ground that he had no opportunity to cross-examine himself or that he was not under oath.¹⁰⁶ The party who made the statement is in a poor position to urge its lack of trustworthiness.

Rule 63 (8) of the *Uniform Rules* creates an exception for authorized and adoptive admissions.¹⁰⁷ Clause (a) provides for exceptional admissibility where the declarant has been given specific authority by the party to make the statement. Though there is some conflict of decisions in North Carolina, clause (a) states the common law rule and the rule applied in the more convincing North Carolina cases dealing with the problem.¹⁰⁸ Clause (b) states the orthodox exception for

¹⁰³ Admissions by parties as an exception to the hearsay rule are defined as follows: "As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement." *UNIFORM RULES OF EVIDENCE*, rule 63 (7).

¹⁰⁴ *Whitson v. Frances*, 240 N. C. 733, 83 S. E. 2d 879 (1954); *Edgewood Knoll Apartments v. Braswell*, 239 N. C. 560, 80 S. E. 2d 653 (1954); *Gibson v. Whitton*, 239 N. C. 11, 79 S. E. 2d 196 (1953); *Jernigan v. Jernigan*, 238 N. C. 444, 78 S. E. 2d 179 (1953); *State v. Dockery*, 238 N. C. 222, 77 S. E. 2d 664 (1953); *State v. Minton*, 234 N. C. 716, 68 S. E. 2d 844 (1952); *Anderson v. Office Supplies, Inc.*, 234 N. C. 142, 66 S. E. 2d 677 (1951); *State v. Marsh*, 234 N. C. 101, 66 S. E. 2d 684 (1951); *State v. Hicks*, 233 N. C. 511, 64 S. E. 2d 871 (1951); *Browder v. Winston-Salem*, 231 N. C. 400, 57 S. E. 2d 318 (1950); *State v. Davis*, 229 N. C. 386, 50 S. E. 2d 37 (1948); *State v. Peterson*, 228 N. C. 736, 46 S. E. 2d 852 (1948); *Wells v. Burton Lines, Inc.*, 228 N. C. 422, 45 S. E. 2d 569 (1947); *Davis v. Morgan*, 228 N. C. 78, 44 S. E. 2d 593 (1947); *State v. Artis*, 227 N. C. 371, 42 S. E. 2d 409 (1947); *State v. Ragland*, 227 N. C. 162, 41 S. E. 2d 285 (1947); *STANSBURY, N. C. EVIDENCE* § 167. The North Carolina cases do not always distinguish between admissions and declarations against interest.

¹⁰⁵ *Carlton v. Bernhardt-Seagle Co.*, 210 N. C. 655, 188 S. E. 77 (1936).

¹⁰⁶ *MCCORMICK, EVIDENCE* § 239; *STANSBURY, N. C. EVIDENCE* § 167; *Morgan, Admissions as an Exception to the Hearsay Rule*, 30 *YALE L. J.* 335 (1921).

¹⁰⁷ "As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth."

¹⁰⁸ *Edgewood Knoll Apartments v. Braswell*, 239 N. C. 560, 80 S. E. 2d 653 (1954); *Commercial Solvents v. Johnson*, 235 N. C. 237, 69 S. E. 2d 716 (1952); *Fanelty v. Jewelers*, 230 N. C. 694, 55 S. E. 2d 493 (1949); *Owsley v. Henderson*, 228 N. C. 224, 45 S. E. 2d 263 (1947); *STANSBURY, N. C. EVIDENCE* § 169. The conflict in North Carolina cases has resulted from an occasional requirement ex-

adoptive admissions.¹⁰⁹ Not only is adoption by words of express adoption or by the making of false, contradictory, or evasive statements covered; admissions by silence where a statement is made in a party's presence under such circumstances that a denial would be expected if the statement were untrue come within the proposed rule.

The *Uniform Rules* provide that vicarious admissions shall be admissible as an exception to the hearsay rule under the following definition: "As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability."¹¹⁰ Clause (a) goes beyond most of the cases. It disregards the complicating *res gestae* requirement that the statement must concern a matter then being done within the scope of the agency or employment.¹¹¹ Thus a statement about how an accident occurred made by a driver-employee of a party after an automobile accident, though it would usually be excluded if offered against the party under the present rule, would be admissible under the proposed rule, assuming the agency to have been established by other evidence. McCormick has this to say about such very common situations: "The rejection of such post-accident statements coupled with the admission of the employee's testimony on the stand is to prefer the weaker to the stronger evidence. The agent is well informed about acts in the course of the business, his statements

pressing the criticized *res gestae* principle that what the agent says must be relative to an act presently being done by him within the scope of his agency or employment, even though he is *authorized* to speak. "In dealing with the declarations of the principal himself, there is no mention of any *res gestae* requirement, because such declarations are obviously offered as admissions *about* the transaction and not as a part of the transaction itself. Wherefore the ritualistic recital of a *res gestae* requirement in dealing with admissions through agency?" Note, 7 N. C. L. REV. 74 (1928). "The question . . . turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case, and not upon any rule of Evidence." 4 WIGMORE, EVIDENCE § 1078.

¹⁰⁹ Powell v. Daniel, 236 N. C. 489, 73 S. E. 2d 143 (1952); State v. Bryant, 235 N. C. 420, 70 S. E. 2d 186 (1952); State v. Hendricks, 232 N. C. 447, 61 S. E. 2d 349 (1950); State v. Sawyer, 230 N. C. 713, 55 S. E. 2d 464 (1949); Landis v. Gittlin, 229 N. C. 521, 50 S. E. 2d 298 (1948); State v. Gentry, 228 N. C. 643, 46 S. E. 2d 863 (1948); Davis v. Davis, 228 N. C. 48, 44 S. E. 2d 478 (1947); MCCORMICK, EVIDENCE §§ 246-250; STANSBURY, N. C. EVIDENCE §§ 178, 179; Note, 8 N. C. L. REV. 83 (1929).

¹¹⁰ UNIFORM RULES OF EVIDENCE, rule 63 (9).

¹¹¹ See note 92 *supra*.

offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make such statements unless they are true."¹¹² He feels that such statements possess the requisite quality of trustworthiness and that the general acceptance of the modification of present law contained in clause (a) "seems expedient."¹¹³ In effect, the proposal means that an agent's statement about any conduct within the scope of the agency is admissible if the statement is made while the agency relationship continues. There are no *res gestae* overtones.

Clause (b) of Rule 63 (9) covers declarations of conspirators. It states the general rule, except that there is no requirement that the declaration be made in furtherance of the common design in order for the declaration of one conspirator to be admissible against the others. The law of conspiracy makes every conspirator responsible for the acts of his confederates in futhering the conspiracy, and this same principle has usually been applied to the question of admissibility of vicarious admissions among conspirators.¹¹⁴ This is not, however, a question of substantive criminal law. The test should be whether this type of hearsay has an element of trustworthiness superior to that of ordinary hearsay. That it does is apparent when one considers that the conspirator-declarant has special knowledge and is generally speaking against his own interest in making such a declaration. These evidential considerations exist whether or not the words uttered are in futhrance of the conspiracy so long as the declarant was still participating in the continuing conspiracy. Thus, this slight change would seem to be in the right direction, eliminating an aberration in the law of evidence caused by the importation of a criminal law principle which actually does not purport to deal with the problem of proof.¹¹⁵ Under the proposal, the statement of the conspirator-declarant must be "relevant" to the conspiracy, but it does not have to have been in furtherance of it.

Clause (c) of the exception for vicarious admissions has been adopted in some jurisdictions by statute. It provides that where a party may be substantively liable for conduct of an extrajudicial declarant, the statements of the declarant relative to the conduct are admissible against the party. It would, for example, admit the extrajudicial statements of a principle against his surety. "If a law suit includes a rational investigation of a dispute as to facts, it seems entirely reasonable to use the same evidence to establish the liability of X in an action between

¹¹² McCORMICK, EVIDENCE § 244.

¹¹³ *Ibid.*

¹¹⁴ *State v. Benson*, 234 N. C. 263, 66 S. E. 2d 893 (1951); *State v. Gibson*, 233 N. C. 691, 65 S. E. 2d 508 (1951); *State v. Blanton*, 227 N. C. 517, 42 S. E. 2d 663 (1947); *State v. Wells*, 219 N. C. 354, 13 S. E. 2d 613 (1941); STANSBURY, N. C. EVIDENCE § 173; MODEL CODE OF EVIDENCE, rule 508 (b), Comment.

¹¹⁵ McCORMICK, EVIDENCE § 244.

P and D as would be used to establish the same liability in an action between P and X."¹¹⁶ For if the action were between P and X, the statement would be an admission of a party opponent and admissible without any question. While this clause would seem to be particularly applicable to the statements of the principal in an action against the surety, it might effect other changes if applied to torts cases where the master is sued for the servant's torts. Yet, in most of those cases, the other provisions for admissions already covered would usually provide for admissibility of the servant's extrajudicial statements against the master, though not in all. For example, the servant might have no authorization to make a statement for the master, and the statement might have been made after the termination of the employment. In any event, since the statements by the declarant relate to matters likely to be in the special knowledge of the declarant and will nearly always be against the declarant's interest, there is present that assurance of trustworthiness or reliability which supplants the test of cross-examination of the declarant.¹¹⁷ Such a statement of a principal offered against his surety is now admissible in North Carolina provided the admission was made "during the transaction of the business for which the surety is bound so as to become a part of the *res gestae*."¹¹⁸ Again, this troublesome Latin expression obscures another hearsay problem.

The *Uniform Rules* do not contain any exception in favor of statements of joint obligors or joint obligees concerning the joint obligation and statements of predecessors in interest or of those persons having a common interest. A majority of jurisdictions recognize exceptions of this sort based on the concept of privity found in property law.¹¹⁹ The most frequent application of this principle is the use of a statement of a predecessor in title to land against his successor. Morgan criticizes exceptions based on privity on the ground that it furnishes no criterion of credibility and no aid in the evaluation of testimony.¹²⁰ The idea seems to be more that statements of predecessors in title "run with the land" rather than that there is some special feature assuring reliability. To the extent that such statements are declarations against interest, that exception will cover them and this exception based on privity is not

¹¹⁶ MODEL CODE OF EVIDENCE, rule 508 (c), Comment.

¹¹⁷ McCORMICK, EVIDENCE § 245.

¹¹⁸ *Dixie Fire Ins. Co. v. Bonding Co.*, 162 N. C. 384, 78 S. E. 430 (1913); STANSBURY, N. C. EVIDENCE § 175. N. C. GEN. STAT. § 109-38 (1955) provides that in actions on official bonds, anything which would be admissible against the principal shall be admissible against the sureties. Thus, North Carolina has already accepted the proposal in an important area covered by it.

¹¹⁹ *Newkirk v. Porter*, 240 N. C. 296, 82 S. E. 2d 74 (1954); McCORMICK, EVIDENCE § 245; STANSBURY, N. C. EVIDENCE § 174, 175; 4 WIGMORE, EVIDENCE §§ 1080 *et seq.*

¹²⁰ Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929); Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937).

needed. If they are not against the declarant's interest, it is hard to perceive any guaranty of trustworthiness. Wigmore took a position favorable to such exceptions largely because of his keen conviction that the hearsay rule stands in dire need of "elastic relaxation."¹²¹ The weight of authority is with Wigmore, but the *Uniform Rules* are with Morgan, and it is significant that this is certainly one area where the Commissioners have made the hearsay rule less liberal than prevailing law. But, as McCormick points out, "this omission is doubtless justified by the fact that the declarations would nearly always come in under the . . . liberal rules admitting declarations against interest. . . ."¹²² Indeed, it has been argued convincingly that most of the cases admitting hearsay statements on grounds of privity between the declarant and the party against whom offered could be explained within the limits of the exception for declarations against interest.¹²³

Declarations against Interest. An extrajudicial statement of an unavailable declarant as to facts against his pecuniary or proprietary interest when made is an exception to the rule against hearsay which is generally recognized.¹²⁴ It is distinguished from an admission in that it need not have been made by a party, authorized by a party, or made by one for whose statements a party is vicariously responsible. On the other hand, an admission need not have been against the interest of the declarant when made, although it will usually be, the declarant need not be unavailable, nor does the declarant need to have had personal knowledge of the fact admitted.

Rule 63 (10) would greatly liberalize this exception. It defines a declaration against interest as "a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true." First, there is no requirement that the declarant be unavailable. This is contrary to the view of most jurisdictions, including North Carolina.¹²⁵ There is, however, much to be said in favor of such a change. There is a strong guaranty of trustworthiness and reliability afforded by the fact that the declaration was against the interest of the declarant. This is

¹²¹ 4 WIGMORE, EVIDENCE § 1080a.

¹²² MCCORMICK, EVIDENCE § 245.

¹²³ MODEL CODE OF EVIDENCE, rule 508, Comment.

¹²⁴ *Williams v. Young*, 227 N. C. 472, 42 S. E. 2d 592 (1947); MCCORMICK, EVIDENCE § 253; STANSBURY, N. C. EVIDENCE § 147; 5 WIGMORE, EVIDENCE §§ 1455 *et seq.*

¹²⁵ MCCORMICK, EVIDENCE § 257; STANSBURY, N. C. EVIDENCE § 147 n. 27; 5 WIGMORE, EVIDENCE § 1456.

similar to the reasoning which supports the exceptions for admissions, excited utterances, and declarations of present mental or physical condition. Unavailability of the declarant is not required for those exceptions. "Since such a statement has as much trustworthiness as one made by the declarant on the witness stand, there is no necessity for showing the declarant to be unavailable as a witness."¹²⁶ The lack of an opportunity for cross-examination being supplanted by the fact that the statement was against the interest of the declarant, something which a declarant is certainly not likely to utter unless it was true, the requirement of unavailability serves no useful purpose. It is the broadening of this exception in this respect which makes it possible for the *Uniform Rules* to dispense with exceptions based on the privity concept.

The other important change which the proposed rule contains is the broadening of the interests of the declarant. The orthodox rule is that the declaration must be against the pecuniary or proprietary interests of the declarant, the significant omission being penal interest.¹²⁷ The change would broaden the interests declared against to include penal and social interests. The old limitation to pecuniary and proprietary interests has been much criticized. It was disapproved but enforced by Brogden, J., in *State v. English*.¹²⁸ The strong dissent by Holmes, J., in *Donnelly v. United States*¹²⁹ in which he pointed out the obvious fact that "no other statement is so much against interest as a confession of murder" is well-known. Wigmore wrote that the rejection of declarations against penal interest is a "barbarous doctrine." "The only practical consequences of this unreasoning limitation are shocking to the sense of justice."¹³⁰ Stansbury criticizes the present limitation as "illogical and unfair."¹³¹ McCormick not only endorses the proposal to include declarations against penal interest within the exception but the change to include social interests as well. ". . . The restriction to material interests, ignoring as it does other motives just as influential upon the minds and hearts of men, should be more widely relaxed. Declarations against social interests . . . seem adequately buttressed in trustworthiness and should be received under the present principle."¹³²

It is not necessary to get indignant about the state of the law in this

¹²⁶ MODEL CODE OF EVIDENCE, rule 509, Comment.

¹²⁷ MCCORMICK, EVIDENCE § 255; STANSBURY, N. C. EVIDENCE § 147 n. 30; WIGMORE, EVIDENCE §§ 1476, 1477. The sharpest application of this limitation is when a defendant in a criminal case is not permitted to show the confession of another person to the crime with which the defendant is charged. A statute changing this rule was proposed some years ago. *Proposals for Legislation in North Carolina*, 11 N. C. L. REV. 51, 63-4 (1932).

¹²⁸ 201 N. C. 295, 159 S. E. 318 (1931), 10 N. C. L. REV. 84.

¹²⁹ 228 U. S. 243, 278 (1913).

¹³⁰ 5 WIGMORE, EVIDENCE § 1477.

¹³¹ STANSBURY, N. C. EVIDENCE § 147.

¹³² MCCORMICK, EVIDENCE § 255.

area in order to approve the proposal for broadening the interests which if declared against will create admissible extrajudicial statements. It is submitted that any statement which is made against a substantial interest of the declarant of whatever class has the required quality of trustworthiness and should be admitted into evidence notwithstanding the rule against hearsay. Admitting it into evidence does not mean that the finders of fact will necessarily believe it; it is an indefensible rule which prohibits them from hearing it at all. The principal consideration is whether there is some circumstance imparting a circumstantial guaranty of truthworthiness to such extrajudicial statements. The "against interest" quality supplies this circumstance, and it does so whether the declarant is or is not available. A good argument can be made that, human nature being what it is, the "against interest" feature is a better assurance of reliability than cross-examination at the trial. To the objection that the extrajudicial statement may never have been made, the answer is that the "making" of the statement only involves the credibility of the witness who testifies that it was made and not the credibility of the declarant. The hearsay rule does not support such an objection.

VII

TREATISES

The *Uniform Rules* contain an exception for "a published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject."¹³³ Such an exception is contrary to the weight of authority, including North Carolina.¹³⁴ One court has substantially adopted the view of the *Uniform Rules*.¹³⁵ The great change the proposed exception would bring about merits special attention here.

A great deal of admissible expert opinion is based on knowledge gained from treatises within the field of the expert. Some jurisdictions permit an expert who bases his opinion upon such sources to be cross-examined by having treatises read to him for the purpose of discrediting him. North Carolina is in the minority which does not permit this, though an expert who relies on a specific treatise by name on his direct examination can be cross-examined by having it read to him,¹³⁶ and it is

¹³³ UNIFORM RULES OF EVIDENCE, rule 63 (31).

¹³⁴ MCCORMICK, EVIDENCE § 296; STANSBURY, N. C. EVIDENCE § 165; 6 WIGMORE, EVIDENCE, §§ 1690, 1693.

¹³⁵ City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939).

¹³⁶ Tilghman v. Seaboard Air Line Ry., 171 N. C. 652, 89 S. E. 71 (1916). Stansbury is critical of the limitations on the use of learned treatises in the cross-examination of experts in North Carolina. "This rule may be theoretically sound,

proper on cross-examination to ask a medical expert whether all recognized medical authorities do not teach a certain thing.¹³⁷ All these practices, however, do not amount, in theory at least, to a use of treatises to prove the truths of the matters therein asserted.

What are the arguments in favor of such an exception? The criterion, as with other exceptions to the hearsay rule, ought to be whether there are considerations which assure reliability so that the test of cross-examination may be said to be substantially supplanted. Initially, it is conceded that the fact that the extra-judicial statement appears in the form of a printed work does not in itself contribute toward trustworthiness. Yet, it is clear that learned writers of treatises do not have any motive to misrepresent. They are not writing with litigation in mind, but, ideally, only to present the truth. Also, they are writing for other experts in the learned field and know that what they publish will be subjected to close scrutiny and searching criticism. Professional reputations are at stake. So here are two qualities of such writings which assure considerable trustworthiness: (1) the professional impartiality of the expert, and (2) the likelihood that any deviations from the truth will be almost instantly discovered and exposed. In addition, there is the consideration that the expert who has written in the field concerned prior to litigation is just as trustworthy, and perhaps more so, than the expert witnesses paid by the parties who have more motive for bias.¹³⁸ To the objection that an expert might write with future litigation in mind, it may be answered that this consideration ought to bear on the qualification of the expert witness who testifies that such a work is a reliable authority in the subject or on the question of whether the judge will judicially notice such reliability. The exception should result in eliminating the present limitations on the use of such treatises for cross-examination of experts, since full substantive use should destroy all restrictions based on impeachment use.¹³⁹

The proposed rule would alter substantially the existing law, then, by admitting any learned treatise as substantive proof subject to its first being judicially noticed or testified to by an expert witness in the field as being a reliable authority on the subject. This and the proposed rules¹⁴⁰ providing for the appointment of expert witnesses by the court should be the solution for much of the current dissatisfaction with ex-

but its practical expediency is open to question, since it is well known that a large part of the scientific expert's knowledge is acquired through hearsay, and a comparison of his views with those of acknowledged authorities should be helpful in evaluating his testimony." STANSBURY, N. C. EVIDENCE § 136.

¹³⁷ *Lynch v. Mfg. Co.*, 167 N. C. 98, 83 S. E. 6 (1914).

¹³⁸ 6 WIGMORE, EVIDENCE § 1692.

¹³⁹ UNIFORM RULES OF EVIDENCE, rule 63 (31), Comment. Substantially the same proposal was made in the MODEL CODE OF EVIDENCE, rule 529.

¹⁴⁰ UNIFORM RULES OF EVIDENCE, rules 59-61.

pert testimony. It is also worthy of mention that the proposed exception will make expert evidence more freely available to litigants regardless of financial ability and the amount of money or property involved in the litigation.

VIII

OTHER EXCEPTIONS IN WHICH UNAVAILABILITY IS NOT A REQUIREMENT

There are several other exceptions to the rule against hearsay in which unavailability of the declarant is not a factor. No attempt will be made to discuss them all exhaustively as many are of minor importance.

Voter's Statements. Rule 63 (11) provides an exception for "a statement by a voter concerning his qualifications to vote or the fact or content of his vote." The reason behind this exception is the likelihood of the truth of previous statements made by a voter concerning this matter, whereas there is a temptation to misrepresent after litigation has begun.¹⁴¹ This rule puts on the opponent the burden of summoning the declarant if he is to be examined on the subject. If the proponent presents the declarant for cross-examination the extrajudicial statement is admissible under Rule 63 (1).¹⁴² Several jurisdictions recognize this exception, although Wigmore did not favor it.¹⁴³ North Carolina recognizes it in a limited fashion, admitting declarations of a voter made before voting and in disparagement of his right to vote against the candidate for whom he voted.¹⁴⁴ The statement of the exception in the *Uniform Rules* goes beyond the reason for the exception in not requiring that the statement be made *ante litem motam*.

Statements of Physical or Mental Condition of a Declarant. Rule 63 (12) defines this exception as follows: "Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition." Both (a) and (b) are widely recognized exceptions to the hearsay rule in most jurisdictions.¹⁴⁵ Trustworthiness

¹⁴¹ UNIFORM RULES OF EVIDENCE, rule 63 (11), Comment.

¹⁴² MODEL CODE OF EVIDENCE, rule 510, Comment. The exception for voter's statements in the UNIFORM RULES is in almost exactly the same language as that in the MODEL CODE.

¹⁴³ 6 WIGMORE, EVIDENCE §§ 1712-1713.

¹⁴⁴ STANSBURY, N. C. EVIDENCE § 176 n. 27.

¹⁴⁵ MCCORMICK, EVIDENCE §§ 265-271; 6 WIGMORE, EVIDENCE §§ 1714-1740.

exists as to (a) because of the spontaneous and contemporaneous character of such statements, and as to (b) because of the unlikelihood that one would misrepresent such past matters when consulting a physician for treatment. Clause (a) is the law in North Carolina.¹⁴⁶ Clause (b) is in some doubt, though there is some authority for it.¹⁴⁷

Business Entries. A simplified version of the *Uniform Business Records as Evidence Act* is contained in the *Uniform Rules*. Rule 63 (13) creates an exception for "writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness." The quality of such records which assures reliability in the absence of cross-examination is the routine, habitual, and disinterested recording which are the indicia of the worth of such records in the business world. False or erroneous entries are likely to be detected by customers, employers, or other employees. Formerly, unavailability of the person making the entries or his production was required, but modern business conditions have dictated a relaxation of this requirement.¹⁴⁸

Though many jurisdictions have adopted a more liberal version by statute, North Carolina was in the forefront in adopting a realistic approach by decision. Entries in the regular course of business are admissible in North Carolina if made at or near the time of the transaction involved and if authenticated by a witness who is familiar with them and the system under which they were made.¹⁴⁹ This is a very progressive view in comparison with most states. The main change which the *Uniform Rules* would install would be a broad definition of "business." Rule 62 (6) defines "a business" as used in exception (13) as including "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." This should open the door for hospital records concerning which there has been considerable doubt, in situations where records of profit-seeking enterprises would be admissible.¹⁵⁰ The same guaranty of trustworthiness exists

¹⁴⁶ STANSBURY, N. C. EVIDENCE §§ 161-163. North Carolina is more liberal than the proposed rule and most jurisdictions in admitting statements of a testator as to a *past* state of mind in will contests.

¹⁴⁷ Moore v. Summers Drug Co., 206 N. C. 711, 175 S. E. 96 (1934), 13 N. C. L. REV. 228 (1935); STANSBURY, N. C. EVIDENCE § 161 n. 21.

¹⁴⁸ McCORMICK, EVIDENCE §§ 281-289; WIGMORE, EVIDENCE §§ 1517-1561.

¹⁴⁹ Dairy & Ice Cream Supply Co. v. Gastonia Ice Cream Co., 232 N. C. 684, 61 S. E. 2d 895 (1950); State v. Lippard, 223 N. C. 167, 25 S. E. 2d 594 (1943); Breneman Co. v. Cunningham, 207 N. C. 77, 175 S. E. 829 (1934); Firemen's Ins. Co. v. Seaboard Airline Ry., 138 N. C. 42, 50 S. E. 452 (1905) (This is a leading case on the subject); STANSBURY, N. C. EVIDENCE § 155; *Proposals for Legislation in North Carolina*, 9 N. C. L. REV. 13, 43-47 (1930).

¹⁵⁰ McCORMICK, EVIDENCE § 290; 6 WIGMORE, EVIDENCE § 1707; Hale, *Hospital Records as Evidence*, 14 So. CALIF. L. REV. 99 (1941).

concerning hospital records and other such noncommercial establishments as is present in business records. The life and health of patients depend on the disinterested and accurate recording of the facts about the patient. It could be argued that the motive for accuracy is even greater than where business records are kept for profit and that, therefore, the justification for dispensing with the requirement of cross-examination is even stronger.

Rule 63 (14)¹⁵¹ removes any doubt concerning the admissibility of evidence of the absence of entry in business records kept in the regular course of business. "It would seem that the failure of a business record to recite an event which would normally be noted in the record if the event had occurred, would be circumstantial evidence of its non-occurrence."¹⁵² Without this exception, of course, such silence is hearsay by analysis as much as an affirmative recital of the happening of the event.

Official Written Statements. There is a common law exception to the hearsay rule covering a written statement of a public official if he was required or authorized by law to record it. Trustworthiness is supplied by the likelihood that an official duty will be performed with honesty and accuracy. There is also the consideration that such records are ordinarily open to public inspection where errors are likely to be exposed and corrected. A great many statutes deal with this matter in North Carolina, though the common law exception is no doubt applicable to any situations not covered by statute.¹⁵³ Great simplification would take place if the proposals of the *Uniform Rules* were adopted in lieu of the present statutes.¹⁵⁴

Rule 63 (17) creates an exception for copies of official records which

¹⁵¹ "Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the nonexistence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them."

¹⁵² UNIFORM RULES OF EVIDENCE, rule 63 (14), Comment.

¹⁵³ STANSBURY, N. C. EVIDENCE § 153.

¹⁵⁴ Rule 63 (15) creates an exception for reports and findings of public officials as follows: "Subject to Rule 64 written reports or findings of fact by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation." This goes beyond the usual limits of the exception by admitting statements made by officers who did not observe the facts but who had a duty to investigate the facts and report their findings. Protection is given the adverse party by Rule 64 which requires that he be given a copy of the writing a reasonable time before trial so that he can prepare to meet it. Rule 63 (16) creates an exception for written reports required by law to be made by persons who are sometimes said to be *ad hoc* public officials, such as physicians, undertakers and ministers of the gospel. Rule 63 (18) creates an exception for recitals in unrecorded marriage certificates. Rule

would supplant the numerous provisions relating to such copies now in the statutes.¹⁵⁵ It, like the other exceptions presently being considered, would be subject to Rule 64.¹⁵⁶

Judgments. Evidence of a criminal conviction is inadmissible in a subsequent civil action growing out of the same occurrence by the majority rule because the prior judgment is hearsay and mere opinion.¹⁵⁷ Prior judgments have only been admissible when falling within the confines of the *res judicata* principle. The question has most often arisen in connection with judgments of conviction of crime offered against a party in a civil action. Some courts have admitted such prior criminal judgments in a later civil case as evidence of the facts on which the judgment was based, the principles underlying the hearsay exception for official written statements supplying a basis for such an exception.¹⁵⁸ Rule 63 (20) creates an exception for "evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment." As explained by the Commissioners, "where a person has had an opportunity to defend himself and has entered a plea of *nolo contendere* or a plea of guilty or has been found guilty beyond a reasonable doubt, the judgment entered on the plea or verdict would seem to have sufficient value to be worth consideration by a trier of fact, and necessarily includes a finding of all facts essential to sustain the judgment in the case in which rendered. Despite the logic of this theory there is widespread opposition to opening the door to let in evidence of convictions particularly of traffic violations in actions which later develop over responsibility for damages. . . . To let in evidence of conviction of a traffic violation to prove negligence and responsibility in a civil case would seem to be going too far and for that reason this rule limits the admissibility of judgments of conviction under the hearsay

63 (19) creates an exception for "the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed. . . ."

¹⁵⁵ "Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record." See STANSBURY, N. C. EVIDENCE § 154.

¹⁵⁶ Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy."

¹⁵⁷ STANSBURY, N. C. EVIDENCE § 143 n. 53; 5 WIGMORE, EVIDENCE § 1671a. See *Swinson v. Nance*, 219 N. C. 772, 15 S. E. 2d 284 (1941).

¹⁵⁸ McCORMICK, EVIDENCE § 295; Cowen, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings*, 40 CALIF. L. REV. 225 (1952); Note, 6 N. C. L. REV. 333 (1928); Note, 69 L. Q. REV. 180 (1953); Note, 39 VA. L. REV. 995 (1953).

exception to convictions of felony."¹⁵⁹ This tightens Rule 521 of the *Model Code* which would have admitted a judgment of conviction "of a crime or misdemeanor."

Rule 63 (21) provides as an exception in favor of a judgment debtor in an action for indemnity or exoneration for money paid or liability incurred by him because of a final judgment, evidence of the prior judgment to prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor. The cases are in conflict.¹⁶⁰

Rule 63 (22) creates an exception for final judgments determining the interest or lack of interest in land of the public or of a state or nation or governmental division.¹⁶¹

Reputation. Rule 63 (28) deals with reputation as to character. The exception provides that if a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated is admissible to prove the truth of the matter reputed. Without getting into the many refinements concerning the situations when character can be proved, it may be pointed out that the proposed rule would abolish the unique and illogical requirement of *State v. Hairston*¹⁶² which holds that character must be dealt with generally and not by character traits.¹⁶³ Also, it relaxes the requirement in North Carolina¹⁶⁴ that only community reputation as to character is admissible by admitting as well the reputation "in a group with which he then habitually associated." Wigmore recommended such a change.¹⁶⁵

Rule 63 (27) makes admissible evidence of community reputation concerning boundaries, important events of general history, and the family history of persons resident in the community. The main change

¹⁵⁹ UNIFORM RULES OF EVIDENCE, rule 63 (20), Comment.

¹⁶⁰ UNIFORM RULES OF EVIDENCE, rule 522, Comment.

¹⁶¹ "This exception has considerable support in the decisions and is sound in reason. A judicial determination of the nature of the title or of the boundaries of the public domain should have evidentiary value in determining disputes over titles or boundaries between private parties where there is relevancy because a tie exists between the two situations." UNIFORM RULES OF EVIDENCE, rule 63 (22), Comment.

¹⁶² 121 N. C. 579, 28 S. E. 492 (1897).

¹⁶³ STANSBURY, N. C. EVIDENCE § 114. The *Uniform Rules* limit character evidence for impeachment purposes to that involving the traits of honesty or veracity. UNIFORM RULES OF EVIDENCE, rules 21 and 22. This would also effect a change in the North Carolina law of evidence.

¹⁶⁴ *State v. Ellis*, 243 N. C. 142, 90 S. E. 2d 225 (1955); *State v. Bowen*, 226 N. C. 601, 39 S. E. 2d 740 (1946).

¹⁶⁵ "But in the conditions of life today, especially in large cities, a man may have one reputation in the suburb of his residence and another in the office or the factory at his place of work. . . . There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man. . . . The traditional requirement about 'neighborhood' reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times." 5 WIGMORE, EVIDENCE § 1616.

would be in the last mentioned matter, for general reputation in the community is not admissible to prove facts of family history in North Carolina.¹⁶⁶ This is not true, however, as to marriage.¹⁶⁷ The broadening of the exception in this manner has some substantial support.¹⁶⁸

Rule 63 (26) provides for an exception for reputation among members of a family concerning family history. This is an exception which is widely recognized.¹⁶⁹

Recitals in Documents Affecting Property. There has been some uncertainty concerning the admissibility of recitals of fact in dispositive documents as evidence of the facts recited.¹⁷⁰ Rule 63 (29) creates an exception, under certain conditions, for recitals in dispositive documents as proof of the matter stated. There is no requirement that the document be "ancient."¹⁷¹ Full recognition of such an exception has been recommended.¹⁷² It would, of course, broaden the position of North Carolina on this exception.

Commercial Lists and the Like. Rule 63 (30) creates an exception for "evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them." This exception is generally recognized.¹⁷³

Depositions. Rule 63 (3) (a) creates an exception for "testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered. . . ." There are, of course, detailed statutory provisions for the taking of depositions in North Carolina.¹⁷⁴ Under the definition of hearsay in the *Uniform Rules* they are certainly hearsay; and so an exception is logically necessary. Yet, a serious question is raised because the proposal

¹⁶⁶ STANSBURY, N. C. EVIDENCE § 149 n. 76. Reputation as to boundary lines is admitted in North Carolina. *Spears v. Randolph*, 241 N. C. 659, 86 S. E. 2d 263 (1955).

¹⁶⁷ STANSBURY, N. C. EVIDENCE § 149 n. 78; 5 WIGMORE, EVIDENCE § 1602.

¹⁶⁸ MCCORMICK, EVIDENCE § 297 n. 4; 5 WIGMORE, EVIDENCE § 1605.

¹⁶⁹ *State v. Miller*, 224 N. C. 228, 29 S. E. 2d 751 (1944); MCCORMICK, EVIDENCE § 297; STANSBURY, N. C. EVIDENCE § 149.

¹⁷⁰ *Skipper v. Yow*, 240 N. C. 102, 81 S. E. 2d 200 (1954) (The opinion in this case by Barnhill, C. J., is illuminating. It indicates that the exception in North Carolina only embraces ancient documents); STANSBURY, N. C. EVIDENCE § 152; UNIFORM RULES OF EVIDENCE, rule 63 (29), Comment.

¹⁷¹ "Since the recitals, whether ancient or recent, when not inconsistent with subsequent dealings with the land or chattel, are likely to be true, the present rule makes no distinction based on the age of the document." UNIFORM RULES OF EVIDENCE, rule 63 (29), Comment.

¹⁷² MCCORMICK, EVIDENCE § 298.

¹⁷³ STANSBURY, N. C. EVIDENCE § 165; 6 WIGMORE, EVIDENCE § 1702; UNIFORM RULES OF EVIDENCE, rule 63 (30), Comment.

¹⁷⁴ N. C. GEN. STAT. §§ 8-71 *et seq.* (1955). § 8-71 provides that "any party in a civil action or special proceeding upon giving notice to the adverse party or his

does not require that the deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition was taken.¹⁷⁵ The present statutes dealing with the matter provide that depositions may be read at the trial only in the event that certain prescribed types of unavailability exist.¹⁷⁶ No doubt the Commissioners felt that since the adversary is given the opportunity to be present and cross-examine at the taking of the deposition, the hearsay rule is satisfied. Yet, it seems that to avoid uncertainty a decision would have to be made as to whether to abolish the present requirements of unavailability in favor of the less restrictive provision of the *Rules*. The majority rule is that some showing of unavailability be made before a deposition can be read into evidence.¹⁷⁷ The suggestion that the necessity for establishing unavailability presently required is incorporated into the proposal by the condition that the deposition be "taken in compliance with the law of this state" avoids the question of policy involved in a highly debatable manner.^{178*}

attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States. . . ." STANSBURY, N. C. EVIDENCE § 18.

¹⁷⁶ UNIFORM RULES OF EVIDENCE, rule 63 (3), Comment.

¹⁷⁷ "Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

"1. If the witness is dead, or has become insane since the deposition was taken.
 "2. If the witness is a resident of a foreign country, or of another state, and it not present at the trial.

"3. If the witness is confined in a prison outside the county in which the trial takes place.

"4. If the witness is so old, sick or infirm as to be unable to attend court.

"5. If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

"6. If the witness is the Governor of the State, or head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

"7. If the witness is a justice of the Supreme Court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

"8. If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a session of the body of which he is a member.

"9. If the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

"10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting." N. C. GEN. STAT. § 8-83 (1955).

¹⁷⁷ MCCORMICK, EVIDENCE § 3.

¹⁷⁸ *Some Hearsay Exceptions in the Uniform Rules of Evidence and New Jersey Evidence Law*, 9 RUTGERS L. REV. 555, 556 (1955).

* (To be concluded in the April issue of this REVIEW.)